Supreme Court of the United States

OCTOBER TERM, 1938

No. 276

RY D. LANDIS, individually and as Attorney General of the State of Florida, *et al.*,

Appellants,

vs.

NE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellees.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

ppellees' Brief in Support of Their Motion to Substitute George Couper Gibbs as a Defendant, and in Opposition to Motion of Appellants to Vacate Decree of Lower Court and Direct Dismissal of Bill of Complaint.

THOMAS G. HAIGHT,
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CARY D. LANDIS, individually and as Attorney General of the State of Florida, *et al.*,
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Appellees' Brief in Support of Their Motion to Substitute George Couper Gibbs as a Defendant, and in Opposition to Motion of Appellants to Vacate Decree of Lower Court and Direct Dismissal of Bill of Complaint.

Opinions Below.

The opinions of the court below are unreported. The opinion of the three-judge Federal Court for the Northern District of Florida granting appellees' motion for an interlocutory injunction was filed on April 4, 1938, and is incorporated in the record on appeal which has not yet been printed. There is no other opinion except the order of the

court below made on July 11, 1938, which denied appellants' motion in that court asking for the same relief which they now seek in this Court, and also denied a motion by appellees to substitute George Couper Gibbs, the present Attorney General of the State of Florida, in place of appellant Cary D. Landis, deceased. That order is annexed to appellees' motion papers herein as Exhibit "4".

Jurisdiction.

Appellants claim that this Court has jurisdiction over this motion because of the inherent power of this Court to refrain from deciding moot controversies. In view of this claim by appellants, the only question presented by this motion is whether or not the controversy has become moot. Appellees contend that the controversy is very much alive and that the continuance of the interlocutory injunction appealed from is vital to the protection of their rights.

Statutes and Rules of Court.

The merits of this appeal will involve the constitutionality of a Statute of the State of Florida (Act of June 9, 1937, Chapter 17807 Laws of Florida, 1937, General Laws, Vol. 1, pages 204-214, inclusive). The particular sections of such State Statute involved in the consideration of this motion are Sections 9 and 10-B which read in part as follows:

> "Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the *duty of the State's attorneys in their respective circuits, under the direction of the Attorney-General to institute proceedings, civil or crimi-*

nal, or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof * * *.

Section 10-B. In the event of the failure of the *State's Attorney and Attorney-General* to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the *State's Attorney and the Attorney-General* could have instituted under the terms of this Act." (Italics ours.)

Section 131, Compiled General Laws of Florida (which will be referred to) defines the duties of the Attorney General of the State of Florida as follows:

"'31. (107). *To have superintendence and direction of State attorneys*—The Attorney-General shall exercise a general superintendence and direction over the several State attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the State attorneys, shall give them his opinion upon any question of law. (Ch. 2098, Feb. 27, 1817, §1.)"

The duties of the State's Attorneys of the State of Florida are defined by Section 4739 of the Compiled General Laws of Florida which reads as follows:

"4739. (3005). *Before the court itself.*—It shall be his duty to appear in the circuit court within his judicial circuit, and prosecute or defend on behalf

of the State all suits, applications or motions, civil or criminal, in which the State is a party. (Ch. 1661, Aug. 6, 1868, §3.)"

Rule 19, sub-division 4 of the Rules of this Court relating to the death of a party and substitution of a successor in interest reads as follows:

"4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

Section 11 of the Act of February 13, 1925 (Title 28 U. S. C. Section 780) reads as follows:

"780. SURVIVAL OF ACTIONS, SUITS, OR PROCEEDINGS—

(a) By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States, or of county, and so forth, of such territory or insular possession. Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one

of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) *By or against officer of State, county, city, and so forth.* Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Notice of application for substitution of parties. Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (Feb. 8, 1899, c. 121, 30 Stat. 822; Feb. 13, 1925, c. 229, §11, 43 Stat. 941)." (Italics ours.)

Rule 25, sub-divisions (a) and (d) of the new rules of Civil Procedure for the District Courts of the United States read as follows:

"RULE 25. SUBSTITUTION OF PARTIES.

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or repre-

sentatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

* * *

(d) *Public Officers; Death or Separation from Office.* When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, §11 (43 Stat. 941), U. S. C., Title 28, §780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

Questions Presented.

(1) Are the appellants State's Attorneys entitled to escape the operation of the temporary injunction appealed from because of the death of the appellant Cary D. Landis, the late Attorney General of the State of Florida and the refusal of his successor George Couper Gibbs to become a party to this action?

(2) Should George Couper Gibbs be substituted as a defendant in place of deceased appellant Cary D. Landis?

Summary Statement.

On April 4, 1938, the United States District Court for the Northern District of Florida, consisting of Hon. RUFUS E. FOSTER, United States Circuit Judge, Hon. LOUIE W. STRUM, and Hon. A. V. LONG, United States District Judges, entered a decree granting an interlocutory injunction restraining all the appellants from enforcing the State Statute referred to above. The persons enjoined included appellant Cary D. Landis, who was then the Attorney General of the State of Florida and the fifteen State's Attorneys for the respective circuits of that state.

On April 25, 1938, the District Court entered an order allowing appellants to appeal to this Court.

Thereafter on May 10, 1938, appellant Cary D. Landis passed away and on May 16, 1938, George Couper Gibbs was appointed as his successor in office.

On May 31, 1938, one Tyrus A. Norwood, an Assistant Attorney General of the State of Florida, allegedly appearing on behalf of the appellant State's Attorneys, filed in the court below a suggestion of the death of appellant Cary D. Landis and moved in the District Court for the precise relief now prayed for in this Court, namely, that the action be dismissed on the ground that it had abated because of the death of the late Attorney General (Ex. "B" annexed to appellants' motion to dismiss).

Appellees countered with a motion to substitute George Couper Gibbs on the ground that he was continuing the conduct of his predecessor in office, was threatening to enforce the Statute and intended to enforce it if the injunction should be vacated, and that there was a substantial need for continuing the suit and the injunction against him (Exhibit "C" annexed to appellants' motion to dismiss); and served upon appellants and George Couper Gibbs a proposed supplemental bill of complaint seeking to bring said George Couper Gibbs into the action as a party defendant (Exhibit "1" annexed to appellees' answer to motion).

Both the appellants' motion to dismiss and the appellees' motion to substitute were heard before the court below on July 11, 1938 and thereupon that court denied both motions (Exhibit "E" annexed to appellants' motion to dismiss).

On August 15, 1938, the said Assistant Attorney General Tyrus A. Norwood, claiming to appear on behalf of the appellant State's Attorneys, docketed their appeal in this Court from the decree granting the temporary injunction and filed in this Court a suggestion of the death of appellant Cary D. Landis similar to that filed in the court below on May 31, 1938 as stated above.

Thereafter, said Assistant Attorney General, Tyrus A. Norwood, made this motion to dismiss in this Court.

Appellees made a motion in this Court on September 20, 1938 to substitute said George Couper Gibbs as a defendant and appellant in place of Cary D. Landis, deceased. In that motion appellees allege that George Couper Gibbs has adopted and continues, and threatens and proposes to continue the course of conduct of his predecessor, and proposes to direct appellant State's Attorneys to prosecute appellees under the State Statute if the pending interlocutory injunction is vacated (par. 25 of appellees' motion to substitute).

Argument.

Appellees contend that their motion to substitute should be granted, and appellants' motion to dismiss should be denied for the following reasons:

(1) The present Attorney General of the State of Florida has appeared in this action and on this appeal through his assistant and representative, Tyrus A. Norwood.

(2) In any event, the Attorney General, George Couper Gibbs is not an indispensable party, and he cannot be prejudiced because he was given full opportunity to come into this action and to defend.

(3) When the action was commenced and the decision of the court below rendered, all proper parties were before the court. The subsequent death of one party cannot justify a dissolution of the temporary injunction.

(4) The present Attorney General has continued all the acts of his predecessor which have been complained of, and will enforce the Statute against complainants if the temporary injunction against the State's Attorneys should be vacated.

(5) If there be any defect of parties by reason of the death of Cary D. Landis, appellees have six months under the Statutes and the Rules of this Court within which to substitute his successors.

(6) There is a substantial need for continuing and maintaining this suit against George Couper Gibbs, as well as against defendant State's Attorneys.

POINT I.

This action has not abated as to the appellant State's Attorneys.

This action could have been commenced in the first instance without joining the deceased appellant, Cary D. Landis.

The State Statute imposes the duty of enforcement upon the State's Attorneys and not upon the Attorney General. The State's Attorneys are at most instructed to act under the Attorney General's direction. The action, however, is their own, and any suit or proceeding under the Statute must be brought by the State's Attorneys.

This is similar to the situation in *Colorado* v. *Toll*, 268 U. S. 228 (1925), where a bill was brought to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were promulgated by the Secretary of the Interior, who was charged with control of the park under the Act of January 26, 1915, Ch. 19; 38 Stat. 798. The statute provided that the director of the National Parks Service "shall, *under the direction of the Secretary of the Interior,* have the supervision, management and control of the several National parks * * *." The statute further authorized the Secretary of the Interior to make necessary regulations for the use of the parks, and to appoint such employees as he should deem necessary. The defendant Superintendent of the Rocky Mountain National Park was charged with the duty of carrying out the instructions of the Secretary of the Interior, who had made certain regulations respecting the use of automobiles in the Rocky Mountain National Park. In overruling the defendant's objection that the Secretary of the Interior should have been made a party, Mr. Justice HOLMES said at page 230:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that *it may be pursued against the defendant without joining either his superior officers* or the United States. *Missouri* v. *Holland*, 252 U. S. 416, 431. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620. As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question. Also the direct appeal to this Court is proper as the State complains of an infringement of its right in the highways and of its other reserved powers and the case as made involves the construction of the Constitution of the United States." (Italics ours.)

This decision has been followed by the lower federal courts. In *Berdie* v. *Kurtz*, 75 F. (2d) 898, and *Darger* v. *Hill*, 76 F. (2d) 198, the Ninth Circuit Court of Appeals held that the Secretary of Agriculture was not an indispensable party to an action to restrain the enforcement of certain regulations made by the Secretary under authority allegedly granted to him by the Agricultural Adjustment Act (Tit. 7, U. S. C., c. 26). It was held sufficient to join as defendants the person in charge of the Los Angeles office of the Field Investment Section of the Agricultural Adjustment Administration of the United States Department of Agriculture, the Market Administrator appointed by the Secretary of Agriculture, and the United States Attorney for the Southern District of California.

Yarnell v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5), held that the Secretary of Agriculture was not an indispensable party to a procceeding to enjoin a control committee selected in the manner provided in a marketing agreement and license issued by the Secretary

under the Agricultural Adjustment Act, from enforcing committee regulations governing the citrus industry.

Ryan v. *Amazon Petroleum Corp.*, 71 F. (2d) 1 (C. C. A. 5) held that the Secretary of the Interior was not an indispensable party to a suit to enjoin an agent of the Department of the Interior and the United States Attorney and the United States Marshal, from enforcing certain portions of the National Industrial Recovery Act (48 Stat. 195), and of the Regulations and Code for the Petroleum Industry promulgated thereunder. The Circuit Court of Appeals, however, denied the injunction on the merits. This Court reversed the decision of the Circuit Court of Appeals and granted the injunction, thus recognizing the propriety of suing inferior officers without joining their superiors. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Judge SIBLEY writing for the Fifth Circuit in the *Ryan* case, said at page 4 (71 F. [2d]):

> "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are acting for others. Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204; State of Colorado v. Toll, Supt., 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespasses against complainants' rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute."

The District Courts have likewise followed the rule laid down by this Court in *Colorado* v. *Toll, supra; Consolidated Gas Co.* v. *Hardy,* 14 F. Supp. 223, 225 (S. D. N. Y.); *Chester C. Fosgate Co.* v. *Kirkland,* 19 F. Supp. 152, 156, 158, (S. D. Fla.).

The injunction order appealed from does not restrain appellants from carrying out instructions heretofore given by George Couper Gibbs, but rather restrains them from carrying out the duty directly imposed upon them by the State Statute. The decree appealed from was obtained after a hearing in which all parties at that time interested were represented, including the deceased Attorney General.

The appellant State's Attorneys informed the court below that "if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and *State's Attorneys* would be *compelled* to prosecute it under the provisions of Section 1 of the Act (State Statute), regardless of whether the suit was brought in the State or Federal Courts" (Exhibit "5" annexed to appellees' answer).

The State's Attorneys have threatened to enforce the Statute, and they cannot be heard now to say that the injunction against them should be vacated because the former Attorney General is now deceased. The Attorney General is no more an indispensable party to the suit than was the United States in *Ickes* v. *Fox,* 300 U. S. 82, 96-97.

Rood v. *Goodman,* 83 F. (2d) 28, 32 (C. C. A. 5), cert. den. 299 U. S. 551, holds that the defect of want of parties does not go to the jurisdiction of the court to entertain the suit, but rather to its discretion as a court of equity to entertain it; that when it plainly appears that no prejudice has been done to the absent party by the decree and

that the decree as to the parties before it is right and completely effective, it ought to stand and the litigation come to an end.

The court below properly exercised its discretion in denying appellants' motion below to dismiss the suit. Since there is no claim that the court below abused its discretion, appellants' motion in this Court should be denied.

The decision below cannot possibly prejudice George Couper Gibbs because he has been given an opportunity to be made a party and has refused voluntarily to take part in the litigation, although his assistant has actively conducted the suit and the appeal on behalf of appellants. If George Couper Gibbs does *not* intend to enforce the Statute, the injunction against the State's Attorneys cannot harm him. If he *does* intend to enforce the Statute, he should be made a party, upon appellees' motion to substitute him in the place of Cary D. Landis. In either event, this action should not be dismissed. The merits of the appeal should be determined in the event that this Court notices probable jurisdiction.

Appellants rely on *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28. That case, however, is not in point. It arose before the Act of February 6, 1899 (30 Stat. 822, 28 U. S. C., §780A)—at a time when there was no statute permitting the substitution of a successor to a defendant public officer who resigned his office during the pendency of an action. In that case, the plaintiff sued Hoke Smith, Secretary of the Interior and Silas W. Lamoreux, Commissioner of the General Land Office. As this Court pointed out, the main object of the bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to the plaintiff for the lands in question (p. 33). During the pendency of the action, Hoke Smith resigned as Secretary of the Interior.

The facts of that case readily show the difference between the Secretary of the Interior in that case and the Attorney General in the case at bar. There, a federal statute directed the Secretary of the Interior to make out a list of the swamp lands in certain states, and to cause a patent to be issued to the states in which such lands were located, to be disposed of by the respective states. The Warner Valley Company purchased certain lands from the State of Oregon, which had been certified by the Secretary of the Interior as swamp land. Thereafter, Hoke Smith decided that these lands were not swamp lands and refused to issue a patent to the State of Oregon. His decision was promulgated by letter from him to the local land officers in Oregon. The Warner Valley Company claimed that Hoke Smith erred in refusing to treat these lands as swamp lands and in refusing to grant a patent to the State of Oregon. The lower courts upheld a demurrer to the bill on the ground "that the whole subject remained under the control of the Secretary of the Interior until the execution of the patent", the plaintiff having contended that the duty to issue a patent became ministerial after the original determination that the lands in question were swamp lands and that the original determination could not be reversed by the Secretary of the Interior. This Court said at page 34:

> "The purpose of the bill was *to control the action of the Secretary of the Interior; the principal relief sought was against him;* and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13."

This Court dismissed the bill, because under the statutes as they then stood it was impossible to substitute Hoke Smith's successor in office. Had this case arisen at the present time, the suit would not have been dismissed because Smith's successor in office could have been substituted, as appellees now ask that the successor of Cary D. Landis be substituted.

In the *Warner Valley* case, the decision as to whether the lands were swamp lands was made entirely by the Secretary of the Interior. In the case at bar, the duty to prosecute complainants under this Statute is defined by the Statute itself. The duty to prosecute is imposed directly upon the appellant State's Attorneys, who have already said that they will prosecute. The requirement of the Statute that they prosecute under the direction of the Attorney General is no different from the requirement in *Colorado* v. *Toll*, 268 U. S. 228, that the Superintendent of Parks act under the direction of the Secretary of the Interior.

The Attorney General of the State of Florida is not an indispensable party to this suit. His predecessor was a party at the time the suit was heard, and the present Attorney General may become a party if he so desires. He was given an opportunity to come in by a motion in the court below and by motion now pending in this Court. He cannot be prejudiced by his own refusal to become a party. On the other hand, appellees will suffer grave prejudice if their complaint should be dismissed and the Attorney General and the State's Attorneys be free to enforce against appellees the severe and drastic penalties of the State Statute.

The other cases relied on by appellants in support of their contention that this appeal has become moot are not in point. In some of them the statute in question was repealed or amended so as to excise the offending provisions (*Berry* v. *Davis*, 242 U. S. 468; *New Orleans Flour Inspectors* v. *Glover*, 161 U. S. 101; *Board of Public Utility* v.

Compania General De Tabacos, 249 U. S. 425). In others, the plaintiff's status so changed during the pendency of the action that the statute no longer applied to him (*Alejandrino* v. *Quezon*, 271 U. S. 528; *Atherton Mills* v. *Johnston*, 259 U. S. 13). In the other cases, the facts changed pending appeal so that plaintiff no longer was in need of and could not obtain the relief prayed for (*Heitmuller* v. *Stokes*, 256 U. S. 359; *Duke Power Co.* v. *Greenwood Co.*, 299 U. S. 259).

POINT II.

George Couper Gibbs should be made a party to this action, as prayed for in appellees' motion to substitute him in place of appellant Cary D. Landis, deceased.

George Couper Gibbs has actually conducted this litigation since his appointment as Attorney General, through his assistant Tyrus A. Norwood, although he has not been made a formal party. Tyrus A. Norwood holds office solely at the pleasure of Mr. Gibbs, and acts only as directed by him. He has no authority to appear in this action except to the extent that his superior, Mr. Gibbs authorizes him to do so. Mr. Norwood has stated that he will enforce this Statute against appellees. That statement was made while Mr. Landis was Attorney General, but it has not been repudiated by Mr. Norwood or Mr. Gibbs. If Mr. Gibbs is a necessary party defendant he may be brought in under the Act of February 13, 1925 (Tit. 28 U. S. C. §780), Rule 25 of the Rules of Civil Procedure, and Rule 19, Subdivision 4 of the Rules of this Court.

Nowhere has Mr. Gibbs denied that he will enforce the State Statute against complainants if appellants' motion be granted. Based on the past and present conduct of the State's Attorneys and Mr. Norwood, his intention to enforce the State Statute seems clear.

In *Allen* v. *Regents of University System*, 304 U. S. 439, substitution of a Collector of Internal Revenue was allowed under similar circumstances, this Court distinguishing *Ex parte LaPrade*, 289 U. S. 444, on which appellants rely, as follows (p. 445):

> "The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U. S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted."

In *Ex parte LaPrade*, 289 U. S. 444, upon which appellants rely, the sole defendant was one Peterson, Attorney General of the State of Arizona. After a hearing before a master and before confirmation of his report, Peterson's term of office expired and LaPrade became the Attorney General of the State. Thereupon, plaintiff served LaPrade with a notice that an application would be made to substitute him in place of Peterson. This Court pointed out that "As grounds for the substitution, plaintiff's application merely stated that each suit relates to the future discharge of the official duties of the Attorney General of Arizona and, following the language of the statute, that there is a substantial need for continuing and maintaining it and obtaining adjudication of the questions involved". *There was no allegation that LaPrade proposed, intended or threatened to continue the acts of his predecessor or to enforce the statute enactment.* In holding that the substitution of LaPrade was improper, this Court said at page 458:

> "Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it."

In the case at bar, there is no suggestion that the present Attorney General considers the State Statute unconstitutional or legally unenforceable; nor is any other reason given why he may "rightly" refrain from an effort to enforce the Statute.

This Court in the *LaPrade* case left open the question of substitution of a state officer who adopts the attitude of his predecessor. But that question was squarely passed upon in *Allen* v. *Regents of University System*, 304 U. S. 439, cited above.

George Couper Gibbs is continuing to act in the same manner that his predecessor Cary D. Landis acted. He is acting through the same assistant, Tyrus A. Norwood. He is seeking through him to have this injunction vacated as against the State's Attorneys so that he may be free to direct them to enforce the terms and penalties of the State Statute against appellees.

The very correspondence issuing out of the present Attorney General's office in connection with this appeal is signed "George Couper Gibbs, Attorney General, By Tyrus A. Norwood Assistant Attorney General" (Ex. "6", annexed to appellees' motion to substitute).

Allen v. *Regents of University System*, 304 U. S. 439 shows that there is no longer any distinction between the law relating to substitution of state officers and that relating to substitution of federal officers. In both cases, the officers are brought in because their acts under an uncon-

stitutional statute invade the constitutional rights of the plaintiffs. The officials are sued in each case as individuals. Neither the State in the one case, nor the United States in the other is a party to the action. The Act of February 13, 1925 (Tit. 28 U. S. C., §780) makes no distinction between the two classes of officials.

George Couper Gibbs has been given notice of the application to substitute him as a party defendant. Such substitution is necessary if appellants' claim that this action has abated is sound. There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved, because the vacatur of the interlocutory injunction would subject appellees to the drastic civil and criminal proceedings and penalties provided for in the State Statute. The court below has already found that appellees would suffer irreparable injury if they were not protected by an interlocutory injunction.

CONCLUSION.

For the foregoing reasons, it is urged that appellants' motion to vacate the decree appealed from and to direct dismissal of the bill of complaint should be denied, and appellees' motion to substitute should be granted.

Respectfully submitted,

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September, 1938